

10 USA,
11 Plaintiff,
12 v.
13 ELIZABETH A. HOLMES,
14 Defendant.

7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA

9
10 Case No. 18-cr-00258-EJD-1 (NC)

11
12 **ORDER GRANTING PLAINTIFF'S
MOTION TO DETERMINE THAT
DEFENDANT LACKS INDIVIDUAL
PRIVILEGE INTEREST IN
DISPUTED DOCUMENTS**

13 Re: ECF 559

14
15 The government seeks to have certain Theranos corporate documents deemed
16 admissible for trial against Defendant Elizabeth A. Holmes. Holmes opposes admission
17 asserting that the documents are confidential communications with her attorney subject to
18 her individual attorney-client privilege. After a careful review of the briefing and
19 documents in dispute, the Court GRANTS the government's motion and deems all thirteen
20 documents admissible in light of the Theranos Assignee's waiver of corporate privilege.

21 **I. BACKGROUND**

22 In 2011, Boies Schiller Flexner LLP ("BSF") began representing Holmes and
23 Theranos in an intellectual property dispute. ECF 619 at 6. After the representation
24 began, BSF continued to offer Holmes and Theranos a variety of legal services in relation
25 to Theranos' patent portfolio, press interactions, and inquiries from government agencies
26 and departments. *Id.* at 6-8. Despite the breadth and duration of BSF's involvement,
27 Holmes and BSF did not sign an engagement letter or establish any formal guidelines

1 describing the scope of BSF's legal representation. *Id.* at 6. Holmes believed that BSF
2 and BSF partner, David Boies, were her attorneys up to the point when she retained
3 separate counsel to represent her in the Securities and Exchange Commission and
4 Department of Justice investigations into Theranos in 2016. *Id.* at 8.

5 In June 2020, the government served Holmes with its Exhibit List for trial, which
6 included thirteen documents that Holmes claims implicate her attorney client privilege.
7 ECF 559 at 5, ECF 619 at 5. The government worked with the Theranos Assignee, "the
8 controller of any remaining Theranos corporate privilege," to handle the documents. ECF
9 559 at 4. Holmes' claim for attorney client privilege is predicated on her understanding
10 that Boies and BSF jointly represented Theranos and Holmes as an individual, not as a
11 representative of the company. ECF 619 at 5. The government contests this assertion,
12 insisting that there was no joint representation, so the documents are subject only to
13 corporate privilege. ECF 559 at 5.

14 On November 20, 2020, the government moved for an order establishing that
15 Holmes lacks an individual privilege interest in Theranos' corporate documents. ECF 559.
16 Holmes opposed the motion. ECF 619. I held a hearing on the motion on December 16,
17 2020. ECF 647. At the hearing, the Court ordered Holmes to submit a privilege log and
18 the disputed documents for in camera review. *Id.*

19 II. DISCUSSION

20 A. Attorney Client Privilege

21 Attorney-client privilege is the oldest common law privilege for confidential
22 communications. *Upjohn Co. v. U.S.*, 449 U.S. 383, 390 (1981). "Its purpose is to
23 encourage full and frank communication between attorneys and their clients and thereby
24 promote broader public interests in the observance of law and administration of justice."

25 *Id.* Information is covered by attorney-client privilege:

- 26 (1) Where legal advice of any kind is sought (2) from a
27 professional legal adviser in his capacity as such, (3) the
28 communications relating to that purpose, (4) made in confidence
(5) by the client, (6) are at his instance permanently protected
(7) from disclosure by himself or by the legal adviser, (8) unless
the protection be waived.

1 *U.S. v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009) (citing *In re Grand Jury Investigation*,
2 974 F.2d 1068, 1071 n.2 (9th Cir. 1992)). Communications between a lawyer and their
3 clients are presumed confidential; the burden to prove otherwise is on the party seeking
4 disclosure. *Id.* at 609 (citing *Gordon v. Superior Court of L.A. County*, 55 Cal. App. 4th
5 1546, 1565 (1997)).

6 **B. Joint Representations for Privilege Purposes**

7 Holmes opposes the government’s motion on the grounds that Boies and BSF
8 jointly represented her and Theranos. ECF 619 at 13. The parties disagree on whether the
9 Court should apply a subjective belief test or the *Graf* test. *See id.* at 13; *see also* ECF 559
10 at 8. Following Ninth Circuit case law, the Court applies the *Graf* test. *See e.g.*, *Waymo*
11 *LLC v. Uber Techs., Inc.*, Case No. 17-cv-00939-WHA (JSC), 2017 U.S. Dist. LEXIS
12 88411*, at *16-17 (N.D. Cal. June 8, 2017), *United States v. Roscoe*, Case No. 07-cr-
13 00373-RMW, 2010 U.S. Dist. LEXIS 149186*, at *6 (N.D. Cal. Mar. 17, 2009). At the
14 December 16, 2020 hearing, Holmes argued that the Court should not use the *Graf* test
15 because it does not apply to this case. The Court disagrees for three reasons.

16 First, contrary to Holmes’ assertion, the Ninth Circuit’s discussion of two joint
17 representation tests in the *Graf* opinion does not limit the *Graf* test’s application to specific
18 cases. The *Graf* opinion describes the two possible tests for joint representation—the
19 *Bevill* test and the subjective belief test—but after extensive discussion of policy and the
20 case law in other circuits, the Ninth Circuit unambiguously chose to adopt the *Bevill/Graf*
21 test. *U.S. v. Graf*, 610 F.3d 1148, 1161 (9th Cir. 2010).

22 Second, the facts of *Graf* are analogous to this case. Like Holmes, *Graf* was
23 indicted for his involvement in the fraudulent operation of a company. *Graf*, 610 F.3d at
24 1152. Like Holmes, *Graf* was the founder of the company, and he sought to exclude the
25 testimony of attorneys who represented the company by asserting his individual attorney-
26 client privilege. *Id.* Although *Graf* was not listed as an employee of the company, the
27 Ninth Circuit determined that this classification was an effort to circumvent several cease-
28 and-desist orders against him so it treated *Graf* as a “functional employee, not an

1 independent outside consultant.” *See id.* at 1153, 1159. These factual parallels reinforce
2 that even if the *Graf* test did not apply to *all* joint representation disputes, *this* case would
3 fall within its purview.

4 Finally, Holmes argues that *Graf* does not apply here because *Graf* addresses the
5 question of formation while *In re Teleglobe Communications Corp.*, 493 F.3d 345, 378
6 (3rd Cir. 2007), addresses the question of scope. The Court disagrees with this
7 characterization of the cases. To demonstrate: envision a Venn diagram with one circle for
8 “company legal matters,” another circle for “individual legal matters,” and a small area of
9 overlap for “common interests.” The *Graf* test establishes that communications with
10 corporate counsel about “individual legal matters” are controlled by the individual’s
11 privilege. *See Graf*, 610 F.3d at 1160. *Teleglobe* states that communications in the
12 overlapping “common interests” area are controlled by the individual’s privilege *and* the
13 company’s privilege. *Teleglobe*, 493 F.3d at 378. Because the two tests govern different
14 parts of the diagram, they are not conflicting tests that apply at different times; rather they
15 work together to define who holds the privilege for what at any moment. Aside from the
16 fact that the *Teleglobe* decision is not binding on this Court, it does not apply to this case
17 because Holmes asserts that the documents at issue regard her individual legal matters, not
18 “common interests.” *See ECF 619 at 15-16.* Therefore, the Court must apply the Ninth
19 Circuit’s *Graf* test.

20 **1. The *Graf* Test**

21 *Graf* requires the person seeking to assert individual privilege to satisfy all of the
22 following factors to establish a joint representation:

23 *First*, they must show they approached counsel for the purpose
24 of seeking legal advice. *Second*, they must demonstrate that
25 when they approached counsel they made it clear that they were
26 seeking legal advice in their individual rather than in their
27 representative capacities. *Third*, they must demonstrate that the
28 counsel saw fit to communicate with them in their individual
capacities, knowing that a possible conflict could arise. *Fourth*,
they must prove that their conversations with counsel were
confidential. And *fifth*, they must show that the substance of
their conversations with counsel did not concern matters within
the company or the general affairs of the company.

1 *Graf*, 610 F.3d at 1160. Before analyzing admissibility of the exhibits, the Court must first
2 apply *Graf* to determine if Holmes has an individual privilege to assert.

3 **2. The *Graf* Test Applied**

4 The Court finds that Holmes fails to establish a joint representation because she
5 cannot satisfy the second, fourth, and fifth elements of the *Graf* test. To satisfy the *Graf*
6 test, Holmes must show that when she approached Boies and BSF for legal advice, she
7 made it clear that she was seeking legal advice in her personal capacity. *See Graf*, 610
8 F.3d at 1160. Holmes fails to make this showing. In her opposition, Holmes insists that
9 “Boies Schiller’s representation of Ms. Holmes (in addition to Theranos) is a matter of
10 public record and thus there is no relationship to be implied,” but she is unable to point to
11 any documents supporting this allegedly obvious joint representation. ECF 619 at 13.
12 Holmes admits that “there was no engagement letter relating to Mr. Boies’ or his firm’s
13 representation of Ms. Holmes and/or Theranos.” *See id.* at 6. And Holmes does not point
14 to any financial records showing that she paid Boies or BSF from her own accounts, not
15 Theranos’. *See id.*; *see also Graf*, 610 F.3d at 1161 (weighing the fact that the company,
16 not *Graf*, paid the firm’s bills against a finding that *Graf* had a joint representation¹).
17 Holmes heavily relies on her belief that Boies and BSF jointly represented her and
18 Theranos, however, Holmes’ subjective belief is not the standard. The standard is a
19 “clear” communication that the individual sought legal advice as an individual, not as a
20 representative of the company; and on that Holmes falls short. *See Graf*, 610 F.3d at 1160.

21 Holmes also cannot show that her conversations with Boies and BSF were
22 confidential. *See Graf*, 610 F.3d at 1160. None of the contested documents include
23 conversations exclusively between Holmes and Boies or BSF. Holmes argues that “with
24 one exception, the communications are between Ms. Holmes or other senior Theranos

25 _____
26 ¹ At the December 16, 2020 hearing, Holmes argued that the payment of legal fees is not
27 an issue here because companies routinely enter into agreements to pay legal fees for the
28 joint representation of a company officer. Holmes stated that, “there’s an indemnification
agreement that obligated Theranos to pay legal fees for Ms. Holmes in connection with
joint representation.” ECF 655 at 33. However, beyond this assertion, Holmes has not
provided evidence of such an agreement to the Court.

1 employees, Theranos in-house attorneys, and Boies Schiller attorneys.” ECF 619 at 18.
2 However, if Holmes is arguing that she sought individual legal advice, the presence of
3 Theranos employees and attorneys destroys the privilege.

4 Lastly, Holmes fails to show that the substance of her conversations with Boies
5 and BSF did not concern matters within the general affairs of the company. *See Graf*, 610
6 F.3d at 1160. None of the contested exhibits discuss Holmes’ individual legal interests. All
7 thirteen documents related to her “official duties” or the “general affairs” of the company
8 like conversations with investors, billing, and media strategy. *See Graf*, 610 F.3d at 1162.

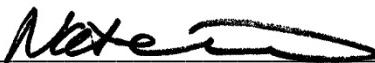
9 In sum, the Court finds that Boies and BSF did not jointly represent Holmes and
10 Theranos because Holmes does not satisfy the second, fourth, and fifth factors of the *Graf*
11 test. Therefore, the holder of attorney-client privilege over the contested documents
12 Theranos’ Assignee, and admissibility of the documents hinges on their waiver of
13 corporate privilege. *See Commodity Futures Trading Com v. Weintraub*, 471 U.S. 343,
14 349 (1985) (finding that “when control of a corporation passes to new management, the
15 authority to assert and waive the corporation’s attorney-client privilege passes as well.”).

16 III. CONCLUSION

17 For the foregoing reasons, the Court GRANTS the government’s motion and finds
18 that the thirteen disputed documents, labeled as Exhibits 1-13 in ECF 559-12, are not
19 subject to Holmes’ individual privilege. The documents are only subject to the Theranos
20 Assignee’s corporate privilege, which the Assignee has waived. *See ECF 559 at 3* (“The
21 Assignee has informed the government that it will not assert privilege over the materials
22 addressed by this motion.”) Thus, the Court deems Exhibits 1-13 admissible.

23 IT IS SO ORDERED.

24
25 Dated: June 3, 2021

26 
NATHANAEL M. COUSINS
United States Magistrate Judge